T.C.A.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTIES OF ADAMS, CANYON, GEM, OWYHEE, PAYETTE AND WASHINGTON

ADMINISTRATIVE DIRECTIVE

TO: THE MAGISTRATES

It has become constitutionally necessary that an alleged violator of probation be afforded a preliminary hearing as soon as practicable after arrest and detention for the purpose of determining whether there is probable cause to detain him until the revocation hearing can be held. That is the inescapable result of the decisions of the United States Supreme Court in Morrissey v. Brewer, 408 U.S. 471, 33 L.Ed.2d 484, 92 S.Ct. 2593 (1972), and Gagnon v. Scarpelli, 411 U.S. 778, 36 L.Ed.2d 656, 93 S.Ct. 1756 (1973), as reaffirmed in Greenholtz v. Nebraska Penal Inmates, U.S. , 60 L.Ed.2d 668, 99 S.Ct. (May 29, 1979), and recognized in State v. Wolfe, 99 Idaho 382, 582 P.2d 728 (1978).

In the Morrissey decision, supra, (a case involving parole violation matters), the Court concluded that the due process provisions of the federal constitution require that an inquiry be held "at or reasonably near the place of the alleged...violation or arrest and as promptly as convenient after arrest", and that the inquiry be in the "nature of a 'preliminary hearing' to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation." 408 U.S. at 485, 33 L.Ed.2d at 496-497. Then, in Gagnon, supra, the Court extended its ruling to cover probation situations, and stated that "a probationer, like a parolee, is entitled to a preliminary and a final revocation hearing, under the conditions specified" in Morrissey. (Emphasis added). The following guidelines for conduct of such preliminary hearing were specified in Morrissey:

"the parolee should be given notice that the hearing will take place and that its purpose is to determine whether there is probable cause to believe he has committed a parole violation. The notice should state what parole violations have been alleged. At the hearing the parolee may appear and speak in his own behalf; he may bring letters, documents, or individuals who can give relevant information to the hearing officer. On request of the parolee, persons who have given adverse information on which parole revocation is to be based are to be made available for questioning in his presence. However, if the hearing officer determines that the informant would be subjected to risk of harm if his identity were disclosed, he need not be subjected to confrontation and cross-examination.

The hearing officer shall have the duty of making a summary, or digest, of what occurs at the hearing in terms of the responses of the parolee and the substance of the documents or evidence given in support of parole revocation and of the parolee's position. Based on the information before him, the officer should determine whether there is probable cause to hold the parolee for the final decision of the parole board on revocation. Such a determination would be sufficient to warrant the parolee's continued detention and return to the state correctional institution pending the final decision. As in Goldberg, 'the decision maker should state the reasons for his determination and indicate the evidence he relied on...'but it should be remembered that this is not a final determination calling for 'formal findings of fact and conclusions of law." 408 U.S. at 486 and 487, 33 L.Ed.2d 497 and 498.

Thus, as already indicated, in every probation violation matter the probationer must be afforded a probable cause hearing as soon as practicable after arrest, absent knowing waiver on the probationer's part. After careful consideration we have determined that this requirement can be satisfied most effectively, from the standpoint of timeliness, if the hearings are conducted by all Magistrates in the district. Our present Local Rule 5 assigns to all of you the matters specified in Idaho Code, section 1-2208, which include, in subsection (3)(a) "quasi-criminal proceedings". While it thus appears that the Rule already covers assignment of such hearings as herein discussed, for the sake of clarity the Rule has been amended to read as follows:

"5. All Magistrates of the Third Judicial District are hereby assigned the matters specified in Idaho Code 1-2208 including the conduct of preliminary hearings in matters of probation violation, and those matters specified by Chapter 23, Title 1, Idaho Code, and all additional matters as permitted by Rule 82(c)(1)(a) IRCP and all proceedings under Title 15, Idaho Code, the Uniform Probate Code."

The question of appointment of counsel will soon arise, It is suggested that you do not adopt a practice of automatically appointing counsel for these hearings. There is at present no absolute requirement that counsel be provided, either under the Gagnon decision, subsequent decisions of the United States Supreme Court, or decisions of the Idaho Supreme Court including State v. Wolfe, supra. Rather, you should apply the guidelines as set forth in Gagnon, make your decision as to counsel on a case-by-case basis, and set forth in your summary of each case your reasons for granting or denying appointment. The Gagnon guidelines state that sound discretion should be exercised in making the decision as to counsel, and that presumptively, appointment should be made if the probationer requests counsel and makes a "timely and colorable claim" that he has not committed the alleged violation of the conditions upon which he has remained free of incarcertation, or that the violation is mitigated and revocation is inappropriate for "substantial reasons" which "are complex or otherwise difficult to develop or present." In making your decision you should also consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself. Not only can the preliminary hearing be knowingly waived, so can the matter of counsel. But where a specific request for counsel is made by the probationer, your reasons for granting or denying the request should be clearly set forth in your summary of the hearing. Keep in mind that this preliminary hearing with which you are concerned is not for the purpose of determining whether there should be revocation and subsequent incarceration, but simply whether there is "probable cause or reasonable ground to believe that the arrested (probationer) has committed acts that would constitute a violation."

Probation personnel and the prosecuting attorneys throughout the district have been told of this situation and advised to establish a procedure for assuring that the entire system complies with the constitutional mandate set forth above. In the scheduling of these hearings

all of you must, of course, be alert to the requirement of timeliness which is emphasized in Morrissey and Gagnon. In order to provide a means for monitoring our progress in meeting the constitutional requirements, it will be necessary that each of you notify the Trial Court Administrator whenever you schedule one of the required hearings, and then have your clerk send him a copy of your minutes which should contain the summary of your decision as to probable cause and reasons for action as to counsel.

Dated this 2nd day of ~~May~~ June, 1980.

ADMINISTATIVE DISTRICT JUDGE